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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. OSBORNE, JR.,
(Counsel of Record)
MARC D. KEFFER
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

36pp

QUESTIONS PRESENTED

1. Whether, as the Sixth Circuit held in conflict with the Tenth Circuit, the NLRA employees' right to select a union representative and to bargain collectively through their representative, free of unlawfully motivated adverse employer action, is an "economic" right under *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), that is waived through the inclusion in a collective bargaining agreement of a provision authorizing only generally defined kinds of employer action.

2. Whether the standard for determining whether a collective bargaining agreement provision waives the employees' NLRA right to bargain through their chosen union representative is the *Metropolitan Edison* "clear and unmistakable waiver" standard, as the First, Second, Third, Fourth Fifth, Eighth, Ninth and Tenth Circuits have held, or the "contract coverage" standard applied by the D.C., Seventh and Sixth Circuits.

3. Whether the "termination" of a collective bargaining agreement, as opposed to its "expiration," relieve the employer and union parties of their statutory duty to bargain in good faith and to maintain the *status quo* as to the conditions in the terminated agreement?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

1. *This Court's NLRA Waiver Doctrine Decisions* 13

2. *Waivers of Employee Rights Against Unlawfully Motivated Employer Action* 16

3. *The "Clear and Unmistakable Waiver" Doctrine/"Contract Coverage" Doctrine Conflict in the Circuits* 21

4. *The Court of Appeals' § 8(d) "Contract Termination" Ruling* 25

CONCLUSION 28

TABLE OF CITED AUTHORITIES

CASES: Page

Alexander v. Gardner Denver Co.,
415 U.S. 36 (1974) 13

Amax Coal Co. v. NLRB,
614 F.2d 872 (3rd Cir. 1980),
rev'd on other grounds 453 U.S
322 (1981) 27

"Automatic" Sprinkler Corp., et al.,
319 NLRB 401 ..... 2, 4, 6-8

"Automatic" Sprinkler Corporation, et al. v. NLRB,
120 F.3d 612 (6th Cir. 1997..... 1, 2, 8-9, 22, 26

C&P Telephone Co. v. NLRB,
687 F.2d 633 (2nd Cir. 1982) 22

Capitol Steel and Iron Co. v. NLRB,
89 F.3d 692 (10th Cir. 1996) 10, 17-19

Chicago Tribune Co. v. NLRB,
974 F.2d 933 (7th Cir. 1992),
denying enforcement to 304
NLRB 495 (1991) 24

Communications Workers of America v. NLRB,
644 F.2d 923 (1st Cir. 1981) 22

Connors v. Link Coal Co., Inc.,
970 F.2d 902 (D.C. Cir. 1992) 23

Conoco Inc. v. NLRB,
91 F.3d 1523 (D.C. Cir. 1996) 23

Dep't of Navy v. FLRA,
962 F.2d 48 (D.C. Cir. 1992) 11

Derrico v. Sheehan Emergency Hospital,
844 F.2d 22 (2nd Cir. 1988) 27

Exxon Research and Engineering Co.,
317 NLRB 675 (1995) 25

Florida Steel Corp. v. NLRB,
601 F.2d 125 (4th Cir. 1979) 22

Gratiot Community Hospital v. NLRB, 51 F.3d 1255
(6th Cir. 1995), *granting enforcement in part to*
312 NLRB 1075 (1993) 23

Hooker Chemicals & Plastics Corp. v. NLRB
573 F.2d 965 (7th Cir. 1978) 27

Intermountain Rural Electric Association v. NLRB,
984 F.2d 1562 (10th Cir. 1993) 28

Local 47, IBEW v. NLRB,
927 F.2d 635 (D.C. Cir. 1991) 23

Mastro Plastics Corp. v. NLRB,
350 U.S. 270 (1956) 9, 12, 15, 21

Metropolitan Edison Co.
460 U.S. 693 (1983) 9, 13-16

NLRB v. Allis-Chalmers Manufacturing Co.,
388 U.S. 175 (1967) 14

NLRB v. Litton Fin. Printing Div.,
893 F.2d 1128 n.6 (9th Cir. 1990),
rev'd in part 501 U.S. 190 (1991) 22, 27

NLRB v. New York Telephone Co.,
930 F.2d 1009 (2nd Cir. 1991) 22

NLRB v. Oklahoma Fixture Co.,
79 F.3d 1030 (10th Cir. 1996) 22

NLRB v. Transport Service Co.,
973 F.2d 562 (7th Cir. 1992) 28

NLRB v. U.S. Postal Service,
8 F.3d 832 (D.C. Cir. 1993),
denying enf'ment to 306 NLRB 640 (1992) 23

Porta-King Bldg. Systems v. NLRB,
14 F.3d 1258 (8th Cir. 1994) 22

Prudential Ins. Co. v. NLRB.,
661 F.2d 398 (5th Cir. 1981) 22

Radio Television Technical School Inc. v. NLRB,
488 F.2d 457 (3rd Cir. 1973) 22

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 16

United Furniture Workers v. NLRB,
336 F.2d 738 (D.C. Cir. 1964) 27

United Paperworkers International Union, Local 274 v. Champion International Corp., 81 F.3d 798 (8th Cir. 1996) 28

Utility Workers v. NLRB, 39 F.3d 1210 (D.C. Cir. 1994) 24

Woelke & Romero Framing v. NLRB, 456 U.S. 645 (1982) 3

STATUTES:

National Labor Relations Act, as amended 29 U.S.C. §151 *et seq.*

Section 7 ..... 2, 3, 19, 21
Section 8(a)(3) 2, 6, 13, 19-20, 21
Section 8(a)(5) 2, 7, 13, 26
Section 8(d) 2, 13, 26

Labor Management Relations Act, as amended, 29 U.S.C. §141 *et seq.*

Section 301 27

MISCELLANEOUS:

Carron and Broughton, *When is "No" Really "No"? - The NLRB's Current Position on the Freedom of Contract, Management Rights, and Waiver*, 13 THE LAB. LAW. 299 (1997) 25

Wagner, *"No" Means "No" When a Party Really Says So: The NLRB's Continued Adherence to the Clear and Unmistakable Waiver Doctrine in Unilateral Change Cases,*
13 THE LAB. LAW. 325 (1997) 25

S.Rep. No. 573 on S.1958, 74th Cong., 1st Sess.,
11 (1935) 20

79 Cong.Rec. 7658 (1935). 20-21

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PETITION FOR A WRIT OF CERTIORARI

Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit in *"Automatic" Sprinkler Corporation et al. v. NLRB*, 6th Circuit Nos. 95-6599 and 96-5159.

OPINIONS BELOW

The decision of the court of appeals is reported at 120 F.3d 612 (6th Cir. 1997) and is reproduced in the separately bound appendix to this certiorari petition ("Pet. App.") at pp. 1a - 21a. The court of appeals order denying rehearing and rehearing en banc is unreported and is reproduced at Pet. App. pp. 22a - 23a. The underlying decision and order of the National Labor Relations Board is reported at 319 NLRB 401 (1995) and is reproduced at Pet. App. pp. 26a - 95a.

JURISDICTION

The decision of the court of appeals issued on July 29, 1997. That court's order denying timely petitions for rehearing and suggestions for rehearing en banc issued on October 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 7, 8(a)(3), 8(a)(5) and 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158(a)(3), 158(a)(5) and 158(d), insofar as pertinent to this case are set out at Pet. App. pp. 96a-98a.

STATEMENT OF THE CASE

Since the early 1900's, "Automatic" Sprinkler Corporation of America ("Automatic") has been engaged throughout the United States in the business of installing, maintaining and inspecting automatic fire protection systems. Throughout this long history, Automatic has been party to collective bargaining

relationships with local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, ("U.A."), including U.A. Local 669, the Petitioner herein.

As of 1992, Automatic employed well over 300 skilled construction employees nationwide. Those employees were covered by twelve extant collective bargaining agreements, each covering an appropriate bargaining unit for National Labor Relations Act purposes, and the employees in each unit had chosen the U.A. local union in their area as their exclusive bargaining representative.

These collective bargaining agreements, like their predecessors, contained traditional "construction industry" subcontracting clauses that afforded Automatic the limited right to contract out fire protection system installation work, but only to contractors bound to U.A. collective bargaining agreements.[1] Those agreements were negotiated against the background that the major cost component of fire protection systems work is the cost of labor and that on the run of contracts there is little profit incentive for a company like Automatic to "buy" labor from a competitor through subcontracting. Indeed, the experience from 1979 to 1992 was that Automatic had invoked the subcontracting clause in its union agreements only in rare, out-of-the-ordinary circumstances, e.g., where it was necessary to supplement its existing workforce on unusually large

---

[1] *See Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 657 (1982) (so-called union signatory subcontracting clauses have, since before 1959, been "part of the pattern of collective bargaining in the construction industry").

construction projects, or to continue to operate during the occasional labor dispute.[2]

The collective bargaining agreements in force as of 1992 and outlined above were due to expire and to become open for renegotiation during the period from 1993 through 1995.

At their 1992 annual meeting, Automatic and Figgie International Inc., its corporate parent, jointly adopted what was termed the "Neutral Plan." That plan was designed to allow Automatic to continue in the business of installing and maintaining fire protection systems -- and to do so without its unionized employees or their bargaining representatives. Pursuant to this plan, all of Automatic's 300 union-represented employees in all the twelve bargaining units were to be *permanently* laid off, i.e. discharged, the twelve bargaining units were to become empty, legally irrelevant shells, and the underlying collective bargaining relationships to become legal nullities.

The terms of the "Neutral Plan" were stated in Automatic's official documents in black and white, and the hearing testimony at the National Labor Relations Board confirmed the substance of those documents. Pet. App. pp. 43a-47a (quoting "Neutral Plan" and summarizing testimony).

The first phase of the plan called for (i) the subcontracting of the labor component of all Automatic fire protection contracts to third-party labor contractors during the term of the extant collective bargaining agreements, (ii) the permanent layoff of all of Automatic's union sprinkler-fitter employees for "lack of work", (iii) the "termination" of the collective

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[2]Transcript of NLRB proceeding at 34, 63-65.

bargaining agreements as each expired, and (iv) the refusal to negotiate new agreements with the employees' union representatives on the asserted ground that Automatic no longer directly employed sprinkler-fitter employees and did not intend to directly employ any such employees in the future.

Under phase two of the Neutral Plan, Automatic would -- after the wholesale discharge of its unionized workforce and disengagement from its longstanding union relationships -- continue to secure contracts to install and maintain sprinkler systems in its own name, but on a *nonunion* basis, while having the labor on such installation and maintenance contracts provided either by employees of third party labor subcontractors or by newly-hired nonunion Automatic employees assigned from a new set of Automatic offices, established under the plan to perform unit work "as Neutral (nonunion) operations."

Automatic did not publicly disclose the "Neutral Plan," but rather maintained it in strict confidentiality; the plan was not even distributed internally by Automatic other than to a "select management group" excluding its Human Resource Director and its outside auditing firm. And, Automatic repeatedly misrepresented its intentions regarding its operational plans to the Union.

There can be no doubt that the purpose of the "Neutral Plan" was to retaliate against Automatic's employees for choosing to be represented by a union and electing to set their wages and working conditions through collective bargaining, and after -- and by reason of so doing -- to operate its business with nonunion employees and without collective bargaining. The documented rationale for the plan as adopted by Automatic was to, *inter alia*, "(e)liminate labor negotiations .

. . [and] cost associated with union grievances" so that Automatic could continue its sprinkler business while "not signatory to any union contract, . . . pay demands and . . . work rules." Pet. App. p. 44a.[3]

And, over the 1992-1994 period, Automatic carried out each of the elements of the clandestine plan precisely as drawn up.

Section 8(a)(3) of the National Labor Relations Act, as amended, makes it "an unfair labor practice for an employer -- (3) to discriminate in [employment] . . . to encourage or discourage membership in any labor organization . . . " Given all the foregoing--and given NLRA § 8(a)(3) -- the National Labor Relations Board concluded that Automatic's "Neutral Plan"-- and its implementation in order to discharge over 300 union employees and to sever 12 established

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[3]Automatic's dedication to ridding itself of its union employees and collective bargaining relationships was illustrated in a 1994 report by its outside auditors which underscored that substantial "added costs" had been incurred by Automatic on certain jobs so that the jobs could be finished and all union employees terminated *before* expiration of the collective bargaining agreements on March 31, 1994, so as to "justify" Automatic's refusal to bargain at that time. According to the auditors, Automatic district offices

> are striving to complete contracts before the end of March . . . when the union contracts will expire and the Division will outsource a majority of their labor. Districts are concerned that sufficient/competent labor will not be available under these outsourcing arrangements and thus are incurring large labor costs without regard to budget to complete all outstanding contracts before this time . . . These additional costs were a total surprise to [the auditors] during closing for January and February. Court of Appeals Joint Appendix Volume III, pp. 1112-13, 1115.

collective bargaining relationships with the end in view of enabling Automatic operate nonunion -- constituted plain § 8(a)(3) violations. In so doing, the Board

> . . . stress[ed] that in the Respondent's internal document containing the subcontracting plan titled "Pro Forma III-A" the Respondent stated that it expected to gain, inter alia, the following benefits from its subcontracting decision:
>
> > Gain *control* of labor costs [emphasis is original] . . . Eliminate labor negotiations; Eliminate costs associated with union grievances . . . Allow "Automatic" to become competitive against non-union contractors.
> >
> > *Thus, there is direct evidence here showing that the Respondent's decision to subcontract the unit work was discriminatorily motivated as it sought to rid itself of union-represented employees.* [Pet. App. p. 30a (emphasis added).]

And, the Board emphasized that Automatic "continues to install and maintain sprinkler systems . . . " Pet. App. p. 31a.

The National Labor Relations Act not only prohibits anti-union discrimination, but requires as well, through its § 8(a)(5), that an organized employer "bargain collectively with the representatives of his employees." That being so, the NLRB also found, as an independent matter, that Automatic violated § 8(a)(5) by implementing the plan without bargaining:

> It is clear that the Respondent's subcontracting decision was a mandatory subject of bargaining, . . .because the Respondent in effect substituted the subcontractors'

> employees for its own. . . [T]he most compelling proof of the Respondents' bad-faith bargaining in this case is our finding above that the subcontracting decision was discriminatorily motivated. [Pet. App. pp. 31a-32a, (citations omitted).]

Board Member Cohen concurred in the Board decision observing that because "the subcontracting violated Sec. 8(a)(3) . . . it [is] unnecessary to pass on whether that subcontracting also violated Sec. 8(a)(5) of the Act." 319 NLRB at 402, n.5.

On appeal, however, the Sixth Circuit reversed the NLRB in all respects. While the NLRB treated this case principally as a § 8(a)(3) union-discrimination case, and only secondarily as a case also raising an independent § 8(a)(5) refusal to bargain charge, the court of appeals proceeded the other way around, focusing first on the refusal to bargain issues rather than the antiunion motivation issue. That court ruled first that

> Petitioners and the unions bargained over the subject of subcontracting and they memorialized that bargain in their respective collective bargaining agreements. . . . Because the collective bargaining agreements contained no language providing for subsequent bargaining during the term of the agreements with respect to the subcontracting of work, the Board had no authority to compel Petitioners to bargain with the unions over that subject . . . [Pet. App. p. 7a.][4]

---

[4]With respect to the Automatic's continuing obligation under the NLRA to negotiate new agreements, the panel held that

> Although when a collective bargaining agreement expires, an employer has a continuing duty to bargain in good faith and maintain the *status quo* as to conditions of employment in the expired agreement. . . it has no such duty at the agreement's

The court of appeals then transmuted its reading of the collective bargaining agreements' subcontracting clause and its concomitant conclusion of no §8(a)(5) violation into a ruling that the subcontracting clause constituted a waiver of the covered employees NLRA § 7/§8(a)(3) rights, all without disturbing the Board's factual findings that Automatic's actions were motivated by unlawful antiunion discrimination:

> . . . Petitioners . . . actions were justified under the subcontracting provisions of the parties' collective bargaining agreement. Therefore, the Board's determination that petitioners unlawfully discriminated against the unions by subcontracting in accordance with the terms of the collective bargaining agreement is *legally erroneous*. [Pet. App. p. 15a, (emphasis added).]

REASONS FOR GRANTING THE WRIT

The National Labor Relations Act is singular in the set of federal laws declaring and protecting employee rights in that the NLRA provides for the contractual waiver of some (but not all) of its statutory employee protections on some (but not all) showings of a manifestation in a labor contract of an intent to waive such rights.

This Court's decisions from *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), through *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), set the general -- and far from

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termination . . . Thus, when the collective bargaining agreements . . . terminated, rather than merely expired . . . Petitioners were relinquished of *any contractual or statutory obligations* to the unions. [Pet. App. p. 11a, (emphasis added).]

definite -- parameters of the NLRA waiver doctrine while leaving at large the question of which NLRA employee rights are waivable and the question of which contractual manifestations of a legally proper waiver are legally sufficient.

And, given the nature of NLRA protected employee rights and the nature of the issues dealt with by the parties in the NLRA system of free collective bargaining, these open NLRA waiver doctrine questions are implicated in almost every set of collective bargaining negotiations and are raised by the collective bargaining agreements that come out of those negotiations.

Not surprisingly, then, the uncertainties that surround these recurring questions have generated recurring litigation that has resulted in a set of conflicts in the courts of appeals.

The Sixth Circuit's decision here -- reversing the National Labor Relations Board's decision and holding that the Union, in agreeing to a standard form "construction industry" subcontracting clause, waived both the employees' NLRA §§7/8(a)(3) rights and their NLRA §§7/8(a)(5)/8(d) rights -- is in square conflict with the Tenth Circuit's decision in *Capitol Steel and Iron Co. v. NLRB,* 89 F.3d 692 (10th Cir. 1996), both with regard to the essentials of the NLRA waiver doctrine and with regard to the meaning and effect of labor contract provisions authorizing certain kinds of employer action during the contract term where the employer then acts from impermissible antiunion motives rather than from permissible business motives. *See* pp. 16-21 *infra.*

That conflict, moreover, reflects a deeper and broader circuit conflict on the scope and nature of the NLRA waiver doctrine. Consistent with the plain language, and with the

rationale, of this Court's *Metropolitan Edison* decision, the First, Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth Circuits follow the rule that waivers of NLRA statutory employee rights must be "clear and unmistakable." In contrast, the District of Columbia, the Seventh -- and with the instant decision -- the Sixth Circuits follow the rule that a showing that the employer action at issue is within an area "covered by" a term of the collective bargaining agreement is dispositive and that a showing of a "clear and unmistakable" waiver is unnecessary, *see* pp. 21-25 *infra*. *Dep't of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992).

The NLRA waiver doctrine questions presented here, moreover, go to the very essence of the Act. The NLRA statutory scheme -- and the free collective bargaining system -- rest on the basic right of employees to form, join and bargain collectively through their chosen union representative free of employer anti-union retaliation. That basic right is greatly diminished if it is determined to be defeasible in collective bargaining. For at that point an essential employee protection becomes a prize that must be won in employer-union tests of collective bargaining economic strength, rather than the legally-guaranteed basis from which collective bargaining over wages, working conditions and other economic matters can begin. And, that right becomes a pale shadow of itself if it is defeasible through a standard contractual agreement -- such as the subcontracting clause here and the wage-setting clause in *Capitol Steel* -- granting the employer an authority to act so as to meet business considerations during the contract term without any stated intent to thereby grant the employer an authority to act so as to mete out retribution to union employees for being union.

Equally to the point the uncertainties as to the NLRA waiver doctrine questions presented here put the NLRA collective bargaining system under the most severe strain in a way that threatens its productive capacities.

A particularly salutary office of collective bargaining is to facilitate agreements that harmonize the employer's need for the efficiencies that come from the flexibility to meet ever-changing economic exigencies as those continually arise with the employees' need for a binding employer commitment to providing them fair recompense for their productive work done under proper working conditions over the contract term. But, as this Court noted in the first of its NLRA waiver doctrine cases, labor contracts must be read "in the light of the law relating to [the contracts] when made," *Mastro Plastics*, 350 U.S. at 279, and the parties take that reality, along with others, into account in their bargaining.

That being so, the uncertainties as to the scope and nature of the law regarding waiver of NLRA-protected employee rights create concomitant uncertainties as to the meaning and effect of provisions granting the employer measured discretionary authority and those uncertainties can only frustrate this kind of creative and productive bargaining. Reaching agreement on such provisions is difficult at best because any such provision carries substantial, and all but unquantifiable, downside risks from the union and employee perspective. But those difficulties are as nothing where the contractual permission to act may be construed as going beyond employer actions motivated by *bona fide* business considerations and extending to actions motivated by unlawful anti-union retaliatory purpose as well. For that approach to reading labor contracts leaves a union worth its salt and with even a modicum of bargaining power literally no choice but to

oppose the inclusion of any such provision with all its available strength.

In short, the NLRA waiver doctrine questions presented here -- on which the court of appeals are in conflict -- are central to the proper effectuation of the Act and of the practice and procedure of collective bargaining the Act is designed to further. This Court therefore should grant this certiorari petition to resolve that conflict.

1. *This Court's NLRA Waiver Doctrine Decisions.* The NLRA, in common with the other federal labor standards laws, establishes a set of statutory employee rights; the two implicated here being the NLRA §§7/8(a)(3) right of employees to "form . . . [a] labor organization[ ] [and] to bargain collectively through [that] representative[ ] of their own choosing" without being subject to employer "discrimination in regard to [their] tenure of employment . . . to . . . discourage [their] membership in [that] labor organization," and the §§7/8(a)(5)/8(d) right of employees to bargain collectively through their union representative with their employer "with respect to [employer actions affecting their] wages, hours, and other terms and conditions of employment" including employer contracting out of the employees' work to other employees that results in the employees lay-off or termination.

While the governing rule under such statutes as Title VII of the Civil Rights Act is that "there can be no prospective waiver of an employee's rights," *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 51 (1974), the NLRA rule is a more nuanced one. In *Metropolitan Edison Co., supra*, the most recent NLRA waiver doctrine decision, the Court summarized its jurisprudence as follows:

> This Court long has recognized that a union may waive a member's statutorily protected rights, including "his right to strike during the contract term, and his right to refuse to cross a lawful picket line." *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967) (footnotes omitted). Such waivers are valid because they "rest on 'the premise of fair representation' and presuppose that the selection of the bargaining representative 'remains free.'". *NLRB v. Magnavox Co.*, 414 U.S. 322, 325 (1974) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956); Cf. *NLRB v. Allis-Chalmers Manufacturing Co., supra,* at 180-181. Waiver should not undermine these premises. Thus a union may bargain away its members' economic rights, but it may not surrender rights to impair the employees' choice of their bargaining representative. *See NLRB v. Magnavox Co., supra,* at 325. [460 U.S. at 705-06.]

And, as to the general *Gardner-Denver* rule noted above, the Court added:

> The union contends that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), demonstrates that the individual right not to be discriminated against may never be waived. In *Gardner-Denver*, however, we noted that waiver would be inconsistent with the purposes of the statute at issue there. As discussed above, the National Labor Relations Act contemplates that individual rights may be waived by the union so

long as the union does not breach its duty of good-faith representation. [460 U.S. at 706 n.11.][5]

---

[5]The *Mastro Plastics* decision is the source for -- and its reasoning serves to illuminate -- *Metropolitan Edison's* basic "economic rights/ choice of representative rights" dichotomy:

> The [NLRA's] policies . . . depend for their foundation upon assurance of "full freedom of association." *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining "the normal flow of commerce and . . . the full production of articles and commodities . . . ." 61 Stat. 136, 29 U.S.C. § 141(b).
>
> On the premise of fair representation, collective-bargaining contracts recently have included certain waivers of the employees' right to strike and of the employers' right to lockout to enforce their respective economic demands during the term of those contracts. *Provided the selection of the bargaining representative remains free*, such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules . . .
>
> Petitioners argue that the words "any strike" [in the no-strike clause] leave no room for interpretation and necessarily include all strikes, even those against *unlawful practices destructive of the foundation on which collective bargaining must rest*. We disagree. We believe that the contract, taken as a whole, deals solely with the economic relationship between the employers and their employees . . . Its strike and lockout clauses are natural adjuncts of an operating policy aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships . . . .
>
> To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike, *even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union*. [350 U.S. at 280-83, second and third emphases added.]

At the same time, *Metropolitan Edison,* drawing on *Mastro Plastics*, makes it plain that a union's collective bargaining waiver of NLRA statutory employee rights is not to be lightly inferred:

> In *Mastro Plastics Corp., supra*, the question was whether a general no-strike provision waived the specific right to strike over an unfair labor practice. While reserving the question whether a union might waive this right if it were "explicitly stated," the Court determined that "there is no adequate basis for implying [the] existence [of waiver] without a more compelling expression of it than appears in . . . this contract." 350 U.S. at 283. Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable. [460 U.S. at 707-08, footnote omitted.][6]

2. *Waivers of Employee Rights Against Unlawfully Motivated Employer Action.* (a) The Sixth Circuit, as we have seen, treated the employee right to select a union representative and

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[6]In the footnote to the foregoing, the Court harmonized the *Metropolitan Edison* "clear and unmistakable waiver" rule and "the holding in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)," as follows:

> There the Court found that a contract provision establishing that a dispute shall be settled exclusively and finally by compulsory arbitration makes clear that the union may not strike over such a dispute. See *id.*, at 105. *Lucas Flour* established that there does not have to be an express waiver of statutory rights, but waiver was implied in the situation only because of the unique conjunction between arbitration and no-strike clauses. Cf. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974). [460 U.S. at 708 n.12.]

to bargain collectively through that representative free of adverse employer actions in retaliation for the employees' exercise of that right as a waivable "economic right" under *Metropolitan Edison* and the inclusion in a collective bargaining agreement of a standard form "construction industry" subcontracting clause, standing alone, as sufficient to effect the waiver of that right.

The Tenth Circuit's *Capitol Steel* decision interprets *Metropolitan Edison* and the NLRA waiver doctrine as being precisely to the opposite. *Capitol Steel* rests on a thoughtful, balanced analysis of the NLRA waiver doctrine question presented here and we therefore set out that opinion at some length. The Tenth Circuit began by setting out the parties' opposing contentions:

> . . . Capitol argues that the wage increase provision in the Agreement gave it the absolute right to increase or decrease any employees' wages whenever and however it chose, if those wages remained above the prescribed minimum of $5.50 per hour. It asserts that the exercise of a valid contractual right cannot be the basis for an unfair labor practice finding. The cases upon which the Company relies for this premise, however, are not dispositive because they fail to address specifically the present context: the exercise of an otherwise valid right in a manner designed to undermine the Union . . .
>
> For its part, the Board asserts that by granting a wage increase in a manner designed to undermine the Union's status as the employees' exclusive bargaining representative, the Company failed to carry out its obligation to bargain in good faith . . . [89 F.3d at 696.]

The Tenth Circuit then analyzed the matter before it as follows:

> Although waiver provision are an acceptable and potentially beneficial part of the collective bargaining process, it does not follow that we should countenance the calculated use of such clauses to undermine the process. It is difficult to imagine a clearer example of an employer granting a benefit in such a manner as to undermine the collective bargaining process than the present case. The ALJ made the following findings, which are supported by substantial evidence in the record:
>
> > Respondent . . . [granted the increases] unilaterally, while engaged in collective bargaining with the Union. In that bargaining, Respondent had refused to make any proposal for a wage increase, had stated that it could not agree to having any minimum wages set by negotiation, and in virtually the same breath with its announcement of the unilateral increases, had stressed its perilous financial condition. Moreover, Nesom [Capitol Steel's President] misstated how long the increases had been under consideration . . . He also mislead [sic] the Union about when the employees would learn of this increase, ...
> >
> > Most significantly, as Nesom admitted, the increases were announced in such a way and at such a time as to sway the employees who would immediately thereafter vote on Respondent's "last and final offer." Indeed, the manner in which Ozment passed out the notices to Clay and Prock at the ratification meeting was calculated to sow dissension and demean the role of the Union.

Capitol Steel, 317 NLRB at 813.

> We agree with the Board that the timing and manner in which Capitol gave out raises to its employees violated its duty to bargain. We presume the Union gained something in exchange for waiving its right to bargain over wages, and we acknowledge the importance of the waiver principle to the bargaining process. However, we decline to endorse the notion that that principle can be implemented to subvert that process. The provision in question here entitled the Company to implement raises unilaterally during the term of the contract. However, when the Company undermined the union's role as the employees' sole bargaining agent by raising wages in a manner engineered to influence employees to vote in its favor at a key moment in the bargaining process, it improperly exploited that waiver and violated §§8(a)(5) and (1) of the NLRA. [89 F.3d at 697.]

(b) The Sixth Circuit's ruling here could not be more wrong and the Tenth Circuit's *Capitol Steel* ruling could not be more right.

The NLRA § 7 right to "form . . . [a] labor organization[ ] and to bargain collectively through [that] representative[ ] of their own choosing . . ." is not an empty right devoid of substance. Out of the experience of the 1930's, and the failure of the first, unenforceable National Labor Relations Act, the sponsors of the Wagner Act provided employees the substantial protections of § 8(a)(3)'s prohibition of employer "discrimination in regard to [the employees'] tenure of employment . . . to discourage [their] membership in [that] labor organization." The heart of that unfair labor practice, and

of the NLRA's protection for employees in forming and bargaining through a union, is the prohibition on adverse employer action born of anti-union motive.[7] As the Wagner Act Senate Report said:

> [I]f the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work. [S.Rep. No. 573 on S.1958, 74th Cong., 1st Sess., 11 (1935).]

And as Senator Walsh, the Act's floor manager added:

> The employer has the economic power; he can discharge any employee or any group of employees when their only offense may be to seek to form a legitimate organization among the workers for the purpose of collective bargaining. This bill declares that this is wrong. It declares that the employee has the right to engage in collective bargaining, and it says, 'Mr. Employer, you must keep your hands off; you shall not use that effective power of dismissal from employment which you have and destroy the organization of the employees by the dismissal of one or more of your employees when they are objectionable on no other ground than that they belong to or have

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[7]Obviously, the employee right to bargain collectively, through their chosen representative, free from unlawfully motivated employer action designed to undermine or frustrate such activity, is likewise fundamental to the purposes of the NLRA, as the 10th Circuit recognized. *Capitol Steel*, 89 F.3d at 696-97.

> organized a labor organization. [79 Cong.Rec. 7658 (1935).]

In terms of the *Metropolitan Edison* economic rights/choice of representative rights dichotomy, then, the right to form and bargain through a union representative free of employer anti-union retaliation is most assuredly in the latter category. As such it is not a waivable right at all.

And, if there be any room left for doubt on this score, *Mastro Plastics* makes it plain that the §§7/8(a)(3) statutory protection against employer action taken for unlawful anti-union purpose is not waived by a labor contract clause like the standard-form "construction industry" subcontracting clause here. As *Mastro Plastics* says, such provisions are properly read as "deal[ing] solely with the economic relations between the employer[] and [the] employees" and not as authorizing "unlawful [employer] practices destructive of the foundation on which collective bargaining must rest," such as employer action "by coercion [to] oust[ ] the employees' lawful bargaining representative." 350 U.S. at 282-83.

3. *The "Clear and Unmistakable Waiver" Doctrine/"Contract Coverage" Doctrine Conflict in the Circuits.* The Sixth Circuit treated separately with the employees' § 7/8(a)(3) rights at issue here and their §§ 7/8(a)(5)/8(d) rights. In the later regard, the court below ruled that the standard-form "construction industry" subcontracting clause in this case sanctioned Automatic's implementation of its unlawfully motivated "Neutral Plan" without Automatic having bargained over the plan with the Unions -- i.e. that the subcontracting clause standing alone waived the employees' right to bargain collectively over the "Neutral Plan":

> Petitioners and the unions . . . memorialized [a] bargain in their respective collective bargaining agreements. . . . Because the collective bargaining agreements contained no language providing for subsequent bargaining during the term of the agreements with respect to the subcontracting of work, the Board had no authority to compel Petitioners to bargain with the unions over that subject . . . [Pet. App. p. 7a.]

That ruling deepens an already pronounced conflict in the circuits.

Nine of the courts of appeal continue to hew to the *Metropolitan Edison* "clear and unmistakable" waiver rule. *E.g., NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1037 (10th Cir. 1996) (right to bargain over effects of employer's decision to subcontract work); *Porta-King Bldg. Systems v. NLRB*, 14 F.3d 1258, 1263 (8th Cir. 1994) (right to bargain over layoffs); *NLRB v. New York Telephone Co.*, 930 F.2d 1009, 1011 (2nd Cir. 1991) (right to information); *NLRB v. Litton Fin. Printing Div.*, 893 F.2d 1128, 1135 n.6 (9th Cir. 1990), *rev'd in part* 501 U.S. 190 (1991) (right to bargain over layoffs); *Prudential Ins. Co. v. NLRB.*, 661 F.2d 398, 400-402 (5th Cir. 1981) (right to union representation); *Communications Workers of America v. NLRB*, 644 F.2d 923, 928 (1st Cir. 1981); *Radio Television Technical School Inc. v. NLRB*, 488 F.2d 457, 461 (3rd Cir. 1973); *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129-30 (4th Cir. 1979) (waiver must be "knowing, clear and unequivocal").

The essential point of all these cases is that the "national labor policy disfavors waivers of statutory rights by unions and thus a union's intention to waive a right must be clear before a claim of waiver can succeed." *C&P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2nd Cir. 1982). And, all recognize that a

contract clause like the subcontracting clause here is not a clear and unmistakable waiver of the employees' right to bargain over a novel, later-conceived employer device of the kind and dimension of the "Neutral Plan."

With the instant decision, the Sixth Circuit joins the Seventh and D.C. Circuits in rejecting the *Metropolitan Edison* rule in cases where the employer invokes a labor contract clause authorizing certain generally defined kinds of employer action as a waiver of the employees' collective bargaining rights in favor of a "contract coverage" rule.[8]

The D.C. Circuit has been the leader of this band of three. *See, e.g., Conoco Inc. v. NLRB*, 91 F.3d 1523, 1528 (D.C. Cir. 1996) (where employer asserts contractual defense to refusal to bargain charge, resolution "rests on an interpretation of the [collective bargaining agreement]" without resort to "clear and unmistakable" standard.); *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836-37 (D.C. Cir. 1993), *denying enf'ment to* 306 NLRB 640 (1992) (rejecting "clear and unmistakable" standard in deciding whether employer had to bargain over cost-cutting measures); *Connors v. Link Coal Co., Inc.*, 970 F.2d 902, 905 (D.C. Cir. 1992), quoting *Dept. of Navy v. FLRA,* 962 F.2d 48 (D.C. Cir. 1992) ("A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain over a matter); *Local 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991)(in examining contract to see whether there is a right to bargain, Supreme Court's waiver jurisprudence inapplicable).

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[8]The Sixth Circuit had presaged its decision in the instant case in *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995), *granting enforcement in part to* 312 NLRB 1075 (1993), in which that court rejected the Board's application of the "clear and unmistakable" waiver analysis in the context of bargaining over the elimination of a hospital's shift program.

Indeed, the D.C. Circuit has expressed "doubt as to whether the Board's requirement of a 'clear and unmistakable' waiver is even appropriate when interpreting a collective bargaining contract." *Utility Workers v. NLRB*, 39 F.3d 1210, 1215-16 (D.C. Cir. 1994).

Then, in *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 1936-37 (7th Cir. 1992), *denying enforcement to* 304 NLRB 495 (1991), the Seventh Circuit followed suit in rejecting the Board's decision that the general language in a management rights clause did not constitute a waiver of the right to bargain over a newly implemented drug testing program. In so doing, Judge Posner

> wonder[ed] what the exact force of the "clear and unmistakable" waiver principle can be when the parties have an express written contract and the issue is what it means, or whether the principle makes much sense now that . . . even a waiver of precious constitutional rights need not be proven by clear and convincing evidence. [974 F.2d at 936-37.]

And, his opinion then posits that "the doctrine of waiver" is totally distinct from the relevant "question of [contract] interpretation;" queries whether "the 'clear and unmistakable' principle . . . makes much sense;" criticizes the *Metropolitan Edison* rule as one "that tilts decision in the union's favor" and, quoting the D.C. Circuit, ultimately finds the "clear and unmistakable waiver" doctrine to be "irrelevant." *Id.*

This is not a disagreement in the law on the way to curing itself. The Board has recently reaffirmed its allegiance to the

"clear and unmistakable waiver" doctrine and rejected the contrary views of Seventh and D.C. Circuits stating that

> [W]e adhere to our clear-and-unmistakable-waiver standard and decline to apply a less rigid "contract coverage" test when determining whether contract language may be invoked as a defense to an alleged failure to bargain over changes in mandatory subjects. The Supreme Court has upheld the clear-and-unmistakable-waiver standard when discussing the impact of a contractual provision on the waiver of a statutory right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). [*Exxon Research and Engineering Co.*, 317 NLRB 675 (1995).][9]

And, we submit, the need for this Court's review is made all the more compelling by the fact that this disagreement is generated by court of appeals decisions already -- and we would venture to say inappropriately -- dismissing the Court's *Metropolitan Edison* decision as an irrelevancy.

4. *The Court of Appeals' § 8(d) "Contract Termination" Ruling.* In rejecting the NLRB's finding that Automatic violated § 8(a)(5) by refusing to bargain with the Union after

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[9]For an analysis and discussion of the varying approaches of the courts of appeals and the Board on this issue, see Carron and Broughton, *When is "No" Really "No"? - The NLRB's Current Position on the Freedom of Contract, Management Rights, and Waiver*, 13 THE LAB. LAW. 299 (1997); Wagner, *"No" Means "No" When a Party Really Says So: The NLRB's Continued Adherence to the Clear and Unmistakable Waiver Doctrine in Unilateral Change Cases*, 13 THE LAB. LAW. 325 (1997) (noting conflict in courts of appeal over Board's continuing application of "clear and unmistakable waiver" analysis, and urging Board to "consider seeking review of an appropriate case in the Supreme Court.")

the collective bargaining agreement had come to an end, the Sixth Circuit held that "when a collective bargaining agreement *expires*, an employer has a continuing duty to bargain in good faith and maintain the *status quo* . . ." but that an employer "has no such absolute duty at the agreement's *termination* . . ." Pet. App. p. 11a, (emphasis added).

While we recognize that this holding, standing on its own, does not generate a question that provides a sufficient basis for a *certiorari* grant here, we would be derelict if we did not show that the ruling is plainly erroneous, is mischievous in the extreme and warrants review (and correction) in connection with review of the foregoing *cert*-worthy questions.

Very simply stated, NLRA § 8(d) *obligates* a party to a collective bargaining agreement, as a precondition to the initiation of bargaining a new agreement and thereby fulfilling the continuing duty to bargain in good faith, to send notice to "the other party to the contract of the proposed *termination* . . . " of the extant agreement. 29 U.S.C. § 158 (d)(1). And, that is therefore what parties do in the run of situations in which a collective bargaining agreement is coming to an end -- they send a notice of *termination, not* a notice of expiration.

Thus, what, under the Act, is the sounding of the opening bell on fulfilling the § 8(a)(5) duty to negotiate in good faith for a new agreement -- the notice formally terminating the extant agreement -- the Sixth Circuit decision makes into a death knell for any and all employer § 8(a)(5) duties and obligations. It is worth emphasizing that, given § 8(d)'s terms and the collective bargaining practices that have crystallized around that provision, the Sixth Circuit's holding is an invitation to industrial chaos. By sending a statutorily required notice for

the opening of bargaining, the employer, according to the panel, would end that very obligation.

That reading of §§ 8(a)(5) and 8(d), we submit, turns the statute against itself. The purpose of the statutory notice obligations in Section 8(d) is not to pretermit the bargaining process but to provide ample notice of a forthcoming contract "termination" so as to facilitate collective bargaining during period following the notice of termination and prior to any resort by the parties to self-help. *E.g.*, *Amax Coal Co. v. NLRB*, 614 F.2d 872, 889 (3rd Cir. 1980), *rev'd on other grounds* 453 U.S. 322 (1981); *Hooker Chemicals & Plastics Corp. v. NLRB*, 573 F.2d 965, 970 (7th Cir. 1978); *United Furniture Workers v. NLRB*, 336 F.2d 738, 740-41 (D.C. Cir. 1964).

That being so, so far as we have found no other court of appeals has embraced the legal proposition on the effect of "terminating" a contract stated in the Sixth Circuit decision.[10] Indeed, the panel decision is squarely contrary to the long line of decisions recognizing that, after a notice of termination, the employer has a continuing §§ 8(a)(5) and 8(d) obligation not simply to recognize and bargain with the union, but also to maintain the *status quo ante* created by the "terminated" collective bargain agreement. *See e.g., Litton Financial Printing v. NLRB*, 501 U.S. 190, 198-99 (1991); *United*

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[10]To be sure, the panel cited *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22 (2nd Cir. 1988). But *Derrico* turned on the issue of whether a terminated or expired collective bargaining agreement will afford jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 -- the provision providing for court enforcement of collective bargaining agreements -- and in addressing that issue, *Derrico* notes that, *under the* § 8(a)(5) *of the NLRA*, once an agreement has terminated the employer is required to bargain with the union and also to maintain the *status quo*. 844 F.2d at 26-27.

Paperworkers International Union, Local 274 v. Champion International Corp., 81 F.3d 798, 801-802 (8th Cir. 1996); *Intermountain Rural Electric Association v. NLRB*, 984 F.2d 1562, 1566 (10th Cir. 1993); *NLRB v. Transport Service Co.*, 973 F.2d 562, 567 (7th Cir. 1992).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM W. OSBORNE, JR.,
MARC D. KEFFER
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036